ALEXANDER L. STEVAS
CLERK

NO. 80-1073

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEPH N. MARÇAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
the State of Louisiana

APPENDIX "A" AND "B" TO OPPOSITION TO MOTION TO DISMISS

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APPENDIX "A"

(APPELLANT'S SUPPLEMENTAL BRIEF
AFTER ORAL ARGUMENT
Filed December 28, 1979)

IN THE SUPREME COURT OF LOUISIANA

NO. 64,318

STATE OF LOUISIANA,
Appellee,

versus

JOSEPH N. MARÇAL, III,
Appellant.

FILED
December 28, 1979

Appeal from the Criminal District Court
for the Parish of Orleans,
No. 260-889
Honorable Charles R. Ward, Judge

APPELLANT'S SUPPLEMENTAL BRIEF
AFTER ORAL ARGUMENT

This Honorable Court granted leave to the parties to file supplemental briefs following the oral arguments had on December 18, 1979. Before briefing the issues intended to be covered in

Appellant's Supplemental Brief After Oral Argument, undersigned counsel would first take this opportunity to correct a misstatement of fact made during the oral argument. It was stated, inadvertently, that appellant had not known of the journal kept by Susan Beatty which reflected all of the checks written against appellant's office account. This was a misstatement of fact. Appellant did know of that journal. When Susan Beatty left appellant's office, she kept many of the financial records and refused to deliver them to appellant's then girlfriend, his present wife, who is an accountant. It took much effort to acquire those papers from Mrs. Beatty. The financial records were finally obtained and turned over to a CPA for an audit in an effort to determine how much money Mrs. Beatty might have embezzled from appellant. When the journal

was not returned to appellant or his representatives, it was concluded that it was either destroyed or kept by Susan Beatty. To appellant, it is still unclear whether the journal had been deliberately thrown behind the file cabinets by Mrs. Beatty or others allied with her or whether it had been accidentally lost. The location of the evidence was not discovered until after the trial. The portion of this brief which discusses Assignment of Error No. 23 deals with the importance of the journal to the determination of Susan Beatty's credibility, one of the central issues in this prosecution.

THE INSUFFICIENCY OF EVIDENCE TO ESTABLISH PROOF OF GUILT BEYOND A REASONABLE DOUBT-Assignment 22

This Assignment of Error relates to the insufficiency of the evidence adduced against appellant at this trial to a judge

sitting without a jury.

Dorothy Boyd and Susan Beatty both testified that appellant made one payoff by check. Dorothy Boyd described the physical characteristics of that check. Susan Beatty, who was familiar with the various checking accounts of appellant, specifically identified the account on which the alleged check was allegedly drawn as appellant's Attorney at Law account.

On the trial of this case, appellant introduced a group of checks which had been drawn upon his Attorney at Law account at the relevant time and the bank statements which showed the activity in that account immediately before, during and after the relevant time period when the alleged check was allegedly presented to the bank for payment and would then necessarily have been reflected on appellant's bank

statement, Dorothy Boyd had described in detail the bank at which she had allegedly either deposited the alleged check or converted it to cash, the approximate date that she had done so, and she testified that the check was paid and never returned to her. Under these circumstances, the alleged check, if it had ever been written and cashed as Dorothy Boyd testified, would necessarily have appeared on Marçal's bank statement for the relevant time period. It did not! From the nature of the business of banking - they do not give away their money and then not follow up with accounting transactions reflected on the bank statements - it is obvious that the checking transaction described by Dorothy Boyd and Susan Beatty never occurred.

During oral argument of this case,

several members of the Court adverted to the "possibility" that the check had been presented for payment to the bank and that a bank officer had notified appellant and allowed him to pick up the check without an accounting transaction reflecting on the appellant's bank statement. Such a view of the agreement between appellant and the bank officer to honor overdrafts overlooks the fact, first, that the bank to which the alleged check was allegedly presented to be cashed was a branch of a different bank, and secondly, even if the bank officer had authorized payment of the check and subsequently allowed appellant to "buy it back," there still would have been bookkeeping records to reflect the receipt of the check from the other bank and cashing of the check. The bank officer would not have

personally cashed the check but would instead have authorized it to be cashed by a teller. That transaction, had it occurred, would have been reflected in bookkeeping records contemporaneously made and ultimately on the bank statement. No such transaction appears. Moreover, the bank statement was prepared many months before the allegations by Dorothy Boyd and Susan Beatty were made. There was no opportunity to manipulate these permanent records of the bank after the allegations were made. It is completely unreasonable to believe the check transaction ever occurred.

The State relies on the testimony of these two witnesses to establish the existence of the cehck and the transaction for which it was allegedly given. It seeks to preclude review by this Court

of the sufficiency of the evidence under a line of cases which follows Thompson v. Louisville, 362 U.S. 199 (1960), and applies the "no evidence" test. Under those cases, if there is some evidence of every essential element of the offense, no matter how incredible the testimony might be, the Federal Constitution would not require the Louisiana Supreme Court to review the sufficiency of the evidence and, as a matter then of State constitutional law, Art. 5, Sec. 5 of the Louisiana Constitution of 1974 would prohibit such factual review in a criminal case. If there is no evidence of one or more essential elements of the offense, the cases cited by the State hold that the sufficiency of the evidence to establish guilt is a question of law which the Court may review without transgressing Art. 5, Sec. 5 of the

Louisiana Constitution.

Since the State filed its brief in this case, the U.S. Supreme Court has decided that the Thompson "no evidence' test is constitutionally inadequate to implement and satisfy the constitutional standard that the State is required to prove guilt beyond a reasonable doubt. In Jackson v. Virginia, 443 U.S.____, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the U.S. Supreme Court held that the sufficiency of the evidence in a State criminal case must be assessed under the standard (99 S.Ct. at 2789):

> whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Stated another way, the Court stated that if reasonable jurors must necessarily have

had a reasonable doubt as to guilt, acquital is required as the only permissible result under Federal constitutional guarantees. 99 S.Ct. at 2789 n. 11.

While the Jackson case delt with a verdict reached by a jury, rather than by a judge sitting without a jury, the principles established by that case apply equally to trials to judges as those to juries. The pinion case upon which the Court relied in Jackson was In re Winship, 397 U.S. 358 (1970). That was a juvenile case in which there was no jury. Jackson was written in a manner to apply to either judge or jury trials because the Court prescribed the standard to be whether "any rational trier of fact," rather than any rational juror, could have found the essential elements of the crime beyond a reasonable doubt.

During the oral argument of this case, it was pointed out that Jackson was a federal habeas corpus case, not a case which reached the Court upon direct review. The Court inquired whether the Jackson case fixed standards for State Court judges' review of the evidence or whether its holding regulated only federal habeas corpus proceedings. That inquiry, we believe, was prompted by the following excerpt from Jackson (99 S.Ct. at 2788):

> Although several of our cases have intimated that the fact-finder's application of the reasonable doubt standard to the evidence may present a federal question when a state conviction is challenged,***, the federal courts of appeals have generally assumed that so long as the reasonable doubt instruction has been given at trial, the no-evidence doctrine of Thompson v. Louisville remains the appropriate guide for a federal habeas corpus court to apply in assessing a state prisoner's challenge to

> his conviction as founded upon insufficient evidence.***

That statement was not intended to limit the application of Jackson to federal habeas corpus proceedings. The Court was merely pointing out that the insufficiency of the evidence, rather than the absence of evidence on any essential element, presented a federal question which was cognizable upon federal habeas corpus proceedings. Federal habeas corpus is available to a state prisoner only in a limited category of cases. These categories are set forth in 28 U.S.C., Sec. 2241(c)(2-4):

> The writ of habeas corpus shall not extend to a prisoner unless-
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein as in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depends upon the law of nations; or
>
> * * * * * *

The above quoted excerpt from the Jackson case merely addresses the threshold jurisdictional question in the type of case then before the Court. It was squarely determined, however, that the insufficiency of the evidence to establish proof beyond a reasonable doubt raised a constitutional issue, not a mere federal issue exclusively within the province of federal habeas corpus proceedings. 99 S.Ct. at

2790. As a constitutional issue. this Court is constitutionally bound to follow and apply the Jackson holding, just as it has previously followed and applied the erroneous no-evidence test of Thompson v. Louisville, which Jackson overrulled. Accord, Art. VI, Sec. 6, U.S. Constitution (Supremacy Clause).

The Jackson case has been held to apply retroactively, so there is no problem with the applicability of that decision to this case. Pilon v. Bordenkircher, __ U.S. __, 100 S.Ct. 7, 8 (1979) (Per Curiam); Blake v. Thompson, ___ U.S. ___, 100 S.Ct. 27 (1979) (2d memo order).

The Jackson case does not empower or authorize the Judges of this Court to substitute their own subjective judgments of the sufficiency of the evidence for that of the fact finder in the trial court. The Court said in this regard (99 S.Ct.

at 2789-90):

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."*** Instead the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.***This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus

> impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. (Emphasis in original; footnotes omitted.)

There was no question in the Trial Court of the genuineness of the bank statements received in evidence by the Court. Viewing the evidence in the light most favorable to the State, we have testimonial evidence of the existence of a particular check drawn upon a particular account contrasted with documentary evidence, business records of an entity over which the defendant could exercise no control, which shows that no such check was ever negotiated. The alleged recipient of the alleged check, however, testified that the check was indeed negotiated and described the bank and her activities in connection with the negotiation of the alleged check.

Under these circumstances, it is impossible reasonably to conclude that the testimonial evidence was truthful when the documentary evidence which would necessarily exist in support of the transaction conclusively shows that no such transaction occurred.

But even assuming that the testimonial weight in support of the existence of the check was equally as weighty as the documentary evidence which disproved its existence, in order to find appellant guilty upon such equally weighted evidence would require the application of a "preponderance of the evidence" standard of proof, rather than the constitutionally required standard of "proof beyond a reasonable doubt." That is constitutionally impermissible under the explicit holding of In re Winship, supra, at 364

in which the Court said:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The testimony adduced with regard to the cash transaction came from the same sources as the testimony relative to the check transaction. Naturally, no one can produce countervailing documentary proof of the non-existence of a cash transaction, as he could do with regard to a check transaction, in order to refute the testimony of witnesses with regard to alleged cash payoffs attributed to him. We believe, however, that once it is demonstrated that it was unreasonable for any

rathional trier of fact to have reasonably concluded beyond a reasonable doubt that the transaction regarding the check actually occurred, the "legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution" (99 S.Ct. at 2789) is no longer viable to save the cash transaction from judicial scrutiny to determine whether it was reasonable to believe that any rational trier of fact could have reasonable concluded that the witnesses' testimony regarding the cash transaction was credible notwithstanding their proven incredibility with regard to the check transaction. It is obvious that the factfinder did not apply the constitutionally required standard of proof beyond a reasonable doubt when it reached the conclusion with regard to the check transaction that the check existed and the

bribery with that check actually occurred. It would be arbitrary and wholly inconsistent with human experience to believe that any different standard of proof and any greater basis for evaluating the witnesses' credibility existed with regard to the cash transaction than with regard to the cehck transaction. Therefore, there is no rational basis for applying the "legal conclusion" with regard to the cash count of the indictment to preserve it from judicial review.

A "legal conclusion" is something less than a "legal presumption." Were the "legal conclusion" referred to in the Jackson case to enjoy the same dignity as a "legal presumption," the Courts should not apply it to this case under the circumstances.

It is well-established in the federal

constitutional jurisprudence regarding "conclusive presumptions" that a "presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.***(W)here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." Leary v.U.S., 395 U.S. 6, 33-34 (1969), quoting Tot v. U.S., 319 U.S. 463, 467-468 (1948). Since the applicability of the presumption of regularity of the verdict cannot survive the constitutionally required scrutiny with regard to the check count, the inference

that the factfinder applied the proper standard of proof with regard to the alleged cash transaction would place a strain upon the "legal conslusion" of regularity well beyond the tensile strength of the due process clause's permissible limits. The verdict in one count cannot be presumed to be regular when, in this particular case, it is shown that the verdict on the other count is necessarily rendered in disregard to the proper constitutional standards and the same witnesses' credibility is the sole criterion upon which any reasonable judgment could have been based.

In the Leary case, the Court dealt with a statutory presumption based upon a finding of fact by Congress several years prior to that petitioner's conduct. While not disputing the validity of Congress'

finding at the time it declared that knowledge of importation could be presumed from the fact of possession, the U.S. Supreme Court held that a statutory presumption based on such findings is subject to constitutional attack when the facts on which the statutory presumption was based no longer exist to warrant the legal presumption. The Court held that in ruling upon a constitutional challenge to the constitutionality of the statutory presumption based on its arbitrariness because based on antiquated factual conclusions the courts must be free to reexamine the factual declaration. 395 U.S. at 52-53. The Court must be free to reexamine the "legal conclusion" that the verdict on the cash transaction was lawfully obtained when it is shown conclusively, as here, that the wrong

constitutional standard of proof was applied to the evidence on another count of the indictment and the factfinder and the source of that evidence is the same with regard to both counts.

The Court has recently applied the standard of the Jackson case in State v. Poree, No. 64,308 of the Docket of the Supreme Court of Louisiana (decided November 1, 1979), rehearing granted (December 13, 1979), in which it held the assertion of the issue of the legal insufficiency of the evidence to support proof of guilt beyond a reasonable doubt was proper in a motion for a new trial in which the defendant asserted that the verdict was contrary to the law and evidence. That issue was not disputed by the State in its Petition for Rehearing or in the motion by the appellant for clarification of the

proceedings to be had following remand of the case to the Trial Court. The motion in the instant case, asserting that the verdict was contrary to the law and evidence, was the proper procedural vehicle to bring this issue before this Court.

In Burks v. U.S., ___ U.S. ___, 98 S.Ct. 2141 (1978), the Supreme Court of the U.S. held that entry of a judgment of acquittal is mandated after an appellate determination that the evidence was legally insufficient to establish guilt beyond a reasonable doubt. Since the evidence in this case is legally insufficient to satisfy the constitutional standard of proof beyond a reasonable doubt, this Court should reverse the judgment on both counts and remand this case for entry of a judgment of acquittal.

NEWLY DISCOVERED EVIDENCE
Assignment No. 23

The principal evidence offered on the motion for a new trial on the ground that it was "newly discovered" was a journal written in the hand of Susan Beatty accounting for all of the checks written during the relevant period, which did not reflect the alleged $200 check; evidence that Dorothy Boyd did not negotiate a check at the Gentilly Branch of the Bank of New Orleans when she said she did; and a mass of evidence which showed that all of the appellant's checking accounts were at the Hibernia National Bank and all of the checks and statements from those accounts during the relevant period. It is significant that Susan Beatty never testified that she was told not to account for the $200 check in the journal nor why she, supposedly having knowledge of the check, never accounted for it in the journal.

Even though the journal was not produced and she was not questioned about her omission of that check from its pages, she did testify about the procedures used in accounting for those checks and if she had been told not to reflect the check in the journal, she certainly would have testified about that. Since she did not, it is reasonable to believe that she was not told not to record the check in the journal. That gives particular significance to the omission of that check from the journal which was not before the Trial Court when it was considering the issue of the existence of the check.

The State, in its brief, expresses doubt that the newly discovered evidence could pass the "reasonable diligence" test. Appellant's testimony reflects that the journal had fallen behind a file cabinet in his office and was not

available for production at the trial because it was not discovered there until after the trial. It is unreasonable to conclude that this evidence would not have been produced at the trial if it had been available at the time of trial. Appellant's wife testified and produced an exhibit she had prepared which accounted for all of the checks drawn upon appellant's Attorney at Law account for the time preceding, during and following the relevant time period. There would have been no strategic advantage in presenting this inferior evidence had the document reflecting the same information, but written in Susan Beatty's own hand, been available. It was crucial to this case to refute Susan Beatty's testimony. How could that have been done better than by rpoducing a journal written in her own

hand which cast doubt upon the fact that she knew of the existence of the check while she failed to account for it or to explain why she had not done so?

With regard to the newly obtained evidence regarding proof that no such check was deposited or cashed on the day Dorothy Boyd testified she negotiated it at the BNO Branch in the Gentilly Schwegmann's store, that evidence did not come out until the time of trial. There was no way counsel of the defendant could have anticipated that testimony. The prosecution and its witnesses were hostile to the defendant and not cooperative in his effort to prepare his defense. As reflected by a letter from BNO, it would have taken several hundred man hours to examine the tapes of the various tellers to check out the negative or affirmative existence of

the transaction about which Dorothy Boyd testified. It cannot be gainsaid that, upon such short notice, it was practically if not virtually impossible to have obtained that evidence during the trial of this case when the necessity for such evidence did not become known until during the trial.

The last group of evidence submitted on the motion for a new trial based on "newly discovered evidence" was (1) a packet of letters from the bankers in this area reflecting that appellant did not have any checking accounts, either in his own name or on which he had power to write checks, in any bank other than the Hibernia National Bank and (2) a letter describing the accounts in the Hibernia National Bank owned by Marçal or which he had power to sign checks against. At the

hearing on the motion for a new trial, appellant presented the checks from the other accounts for the period immediately preceding, during and succeeding the time when Dorothy Boyd and Beatty testified Marçal wrote the $200 check, had Beatty given it to Boyd and Boyd negotiated it. Since Boyd particularly described the check she allegedly received by size, color and signature and Beatty testified that the check was drawn against appellant's Attorney at Law account (the only account in which appellant's checks fit the description given by Boyd), there was no apparent need for the checks and statements of other accounts to be presented in evidence. The necessity to present this evidence was occasioned by an off-the record statement made by Judge Baron Bourg to appellant's former counsel, Pat

O'Brien, that there must have been a check drawn on some account of Marçal's and given to Dorothy Boyd because of the number of witnesses testifying to the transaction and their apparent credibility (supported by their number?).

On the record as it existed before the motion for a new trial, the State's case could only be regarded to establish the existence of the check by a preponderance of the evidence at best, not by proof of beyond a reasonable doubt as constitutionally required. The evidence which has been discovered or obtained in the interval since the verdict is of such a substantial nature that it cannot be doubted that it reasonably would have required a different verdict had it been presented during the trial of this matter. All due diligence was exercised in the

acquisition and presentation of evidence in this case. It would have required extraordinary diligence to have found the lost journal and to have anticipated the Trial Judge would not have accepted the description of the check given by the alleged recipient and appellant's secretary which positively identified the account out of which the alleged check transaction had occurred. Therefore, the motion for a new trial should have been granted.

FAILURE TO OBJECT TO THE COURT'S RULING AGAINST THE DEFENDANT WHICH WAS MADE IN RESPONSE TO THE STATE'S OBJECTIONS TO DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S WITNESSES-Assignments Nos. 6,7 and 11

The State's defense to the errors assigned in Assignments of Error Nos. 6, 7 and 11 is that defendant did not object to the rulings of the Court which were

made in response to the prosecutor's objections to cross-examination by the defense. As authority for the application in the situation here of Art. 841, La.C. Cr.P., the State cites State v. Western, 355 So.2d 1314 (La.1978), and State v. Matthews, 354 So.2d 552 (La.1978). Those cases are easily distinguishable from the instant case. In Matthews, the defendant withheld his motion for a mistrial grounded upon alleged error which occurred during the prosecutor's opening statement until after the State closed its evidence in chief. 354 So. 2d at 1320. It was an objection by the defense, not the State, and the defense attorney gave no reason whatever for his objection, the nature of which was not apparent. The Court held:

> An assignment of error based upon an objection without an

> identified basis presents nothing for our review.

The instant case is distinguishable from the Matthews case and every case cited therein because the rulings to which objections were there made on appeal had not been objected to by either party at the time the alleged error occurred. Art. 841, La. C.Cr.P., provides:

> An irregularity of error cannot be availed of after verdict unless it was objected to at the time of its occurrence.***It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

What the State has overlooked in citing Art. 341, La.C.Cr.P. and the line of cases cited in Matthews is that there was an objection in each of the three instances countenanced in these assignments: THE

STATE'S! At the time the ruling was sought by the State, it was obvious that the defense wanted the Court to overrule the State's objection and permit the inquiry on cross-examination.

The purpose of requiring a contemporaneous objection is to give the Trial Court the opportunity to correct an error made in the proceedings, rather than sandbagging the proceedings by holding back until the appellate proceedings to urge the error. When the State makes an objection, the Court is given the opportunity to study the action taken by it before ruling to the prejudice of the defendant. There is no formalistic requirement for a party who loses his opponent's objection to note an objection to the Court's ruling thereon. Were that the case, there would have been no reason to change

the bill of exceptions procedure under Louisiana law to the procedure provided in Rule 51, F.R.Cr.P.

CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's Original Brief, the judgment below should be reversed. Because of the insufficiency of the evidence to establish proof of guilt beyond a reasonable doubt, this Court should order the entry of a judgment of acquittal upon remand of this case to the Trial Court. In the alternative only, and preserving all rights to further review of the insufficiency issue pending any retrial of this matter, this Court should vacate the verdict and judgment in this case and remand this matter

to the Court below for a new trial in accordnace with constitutional principles.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served on Patrick Fanning, Assistant United States Attorney and cousel pro hac vice for appellee, 500 Camp Street, New Orleans, La, this 28th day of December, 1979.

F. IRVIN DYMOND

APPENDIX "B"

(EXTRACT OF DOCKET BOOK -
Entries of December 18, 1979
and December 28, 1979)

UNITED STATE OF AMERICA

STATE OF LOUISIANA

SUPREME COURT
OF THE
STATE OF LOUISIANA

New Orleans, 70112

EXTRACT OF DOCKET BOOK

64,318 State of Louisiana vs. Joseph N. Marçel, III

ENTRIES

12/18/79 Called, argued and submitted.

12/28/79 Filing supplemental brief by Appellant as ordered by the Court.

I Dan B. Haggerty, Jr., Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract of the Docket Book of this Court.

IN WITNESS WHEREOF, I hereunto sign my

name and affix the seal of the Court aforesaid, at the City of New Orleans this 16th day of April, A.D., 1980.

_____
Deputy Clerk, Supreme Court
of Louisiana